Supreme Court of the United States

OCTOBER TERM, 1898.

No. 288.

JOHN F. MALONY,
Appellant,

vs.

O. H. ADSIT,
Appellee.

Appeal from the District Court of the United States for the District of Alaska.

APPELLEE'S BRIEF.

STATEMENT.

This was an action of ejectment commenced in the District Court of the United States for the District of Alaska, by the appellee to recover possession of an undivided one-half of Lot 4, in Block 4, in the town of Juneau, Alaska. Demurrer was filed to the complaint which was overruled and exception taken. Answer was filed in denial and setting up title, to which reply was filed. Judgment was rendered for plaintiff, and after overruling motion for new trial appeal was taken by defendant to this court.

THE ISSUES.

There is no assignment of errors on behalf of appellant in this court, but the appellant insists in this court upon the errors assigned in the uncompleted appeal to the Circuit Court of Appeals for the ninth circuit, which was transmitted to this court.

These assignments seek to bring in review the questions of the admissibility of certain evidence introduced by plaintiff; the overruling of demurrer to the complaint; overruling defendant's motion for non-suit at the close of the case, for failure of proof, and overruling motion for new trial.

ARGUMENT.

I.

Sufficiency of the Complaint.

The complaint is sufficient as a complaint in ejectment, or, as it is termed in the Oregon Civil Code an "Action for the possession of real property."

It is objected that it does not appear from the complaint, that plaintiff has a legal estate in real property and the nature of such an estate, whether in fee or for life, or for a term of years, as provided by the laws of Oregon.

The allegation in the complaint is, that "the plaintiff and his grantors have been the *owners* by right of prior occupancy and actual possession," etc.

We insist this is a full compliance with the Civil Code of Oregon, which requires the plaintiff in such actions to set forth "the nature of his estate in the property, whether it be in fee, for life, or for a term of years." If plaintiff was the "Owner" by right of prior occupancy and actual possession of the premises in dispute, it was the highest and best title which could be acquired. It was a part of the town of Juneau, the naked legal title to which was in the United States, or in the Townsite Trustee, in trust for those who were "*owners by prior occupancy and actual possession*," the only source of

right to the title in fee, recognized by the United States. It gave the priority of right to the fee. The nature of plaintiff's title, "whether in fee, for life or for a term of years," as required by the Oregon Code is thus sufficiently described by the use of the term "Owner."

This was settled by the Supreme Court of Oregon in the case of Johnson *vs.* Crookshank, 21st Oregon 339, citing Lepell *vs.* Kleinschmeidt, 11 N. Y. 364; Illinois Mutual Fire Insurance Company *vs.* Marsailes Manufacturing Company, 1 Gilm. 236; Jarrott *vs.* Vaughn. 2 Gilm. 132; and Hadlock *vs.* Hadlock 22 Ill. 384. See also Bennett *vs.* Harkrader, 158 U. S. 441.

It is contended that the complaint is insufficient because it is averred that the defendant has ousted the plaintiff of an undivided half interest, one James Winn being owner of the other undivided half.

It is clear one tenant in common may maintain ejectment when there is actual ouster. Barnitz *vs.* Casey 7 Cranch 456; Jackson *et al vs.* Sample, 1 John, N. Y. 231; Hammond *et al vs.* Morrison's Lessee, 33 M. D. 95; Avery *vs.* Hall, 50 Vt. 11; Vance *vs.* Schroyer, 77 Ind; 501; Ricard *vs.* Williams, 7 Wheat 59 and Norris *vs.* Sullivan 47 Conn. 474.

As to the necessity for the plaintiff to allege that he has the legal title, it is not required in a case where the plaintiff has been in the prior possession, against a mere intruder or wrong-doer, or a person subsequently entering without right. Christy *vs.* Scott, 55 U. S. (14 How. 282) DeSabariego *vs.* Maverick 124 U. S. 261; Turner *vs.* Aldridge 1st McAll (U. S.) 229; Wilson *vs.* Fine, 38 Fed. Rep. 789, and cases cited; Slater *vs.* Rawson, 6 Mch. (Miss.) 438;

Hubbard *vs.* Little, 9 Cush (Mass.) 475. See also cases cited in Note 2, Vol. 26, Am. and Eng. Encl. of Law, p. 32.

But, be this as it may, as we have seen, the allegation in the complaint, of "Ownership," constitutes a good cause of action, under the Oregon Code as construed by the Supreme Court of that state, in the case of Johnson *vs.* Crookshank, *supra.* The allegation being sufficient to constitute a cause of action the demurrer was properly overruled.

The Statute of Limitation.

It is argued that if the complaint should be held sufficient otherwise, it must fall for the reason that the action was not commenced within three years from the time the defendant's possession began.

Counsel quote Sec. 3524, Hill's Oregon Code, in support of their position. This section is as follows:

> "In an action to recover the possession of any land tenement, or other real property, *where the entry is forcible*, or when the possession is unlawfully *held by force*, the merits of the title shall not be inquired into; and three years' quiet possession of the premises immediately preceding the commencement of such action by the party in possession, or those under whom he holds, may be pleaded in bar thereof, unless the estate of such party is ended."

It is insisted that this statute covers all actions brought to recover the possession of real property, but it will be observed by its very terms it is restricted to cases where "the entry is forcible, or where the possession is unlawfully held by force." This clearly applies to actions of forcible entry and detainer, and to none other. In this case it is not alleged the entry was "forcible," or that the sop-

session is "unlawfully held by force." It is clear therefore this section has no application whatever to the case made by the complaint in the case at bar.

It is conceded by counsel, at page 11 of their brief, the complaint in this case is not an action in forcible entry and detainer, and they proceed to demonstrate this by quoting sections of the Oregon Code defining such actions and providing what must be shown to constitute an unlawful holding by force.

This then being an action in ejectment, and the statute of limitation applying only to actions in forcible entry and detainer, this objection to the complaint is not well-taken.

As to the assignment of error, based upon the overruling by the court of appellant's motion for judgment of non-suit made at the close of the plaintiff's case, if any error was committed, it was waived by defendant proceeding to give evidence in support of the issues on his behalf (Rec. p. 38).

In the case of the Union Pacific Railway Co. *vs.* Snyder, 152, U. S. 684, it was held that:

> "An exception to a denial of a motion to dismiss the complaint made at the close of plaintiff's evidence is waived by defendant afterwards, proceeding with the case and giving evidence on his part."

The action of the court, therefore, in overruling defendant's motion for non-suit cannot be assigned for error.

Sufficiency of the Evidence.

By stipulation of the parties, in open Court, a jury trial was expressly waived, and by consent the cause was tried by the court, who made a finding of the facts proven, and submitted his conclusions of law from the facts so found, and rendered judgment thereon and threfrom, in favor of the plaintiff, awarding him possession of the land in controversy and costs of suit. From this judgment, after the overruling of motion for new trial, appeal was taken to this court.

Under the well-settled rule of this Court, upon an appeal from the Supreme Court of a Territory, the findings of fact by that court are conclusive upon the Supreme Court of the United States. Harrison *vs.* Perea, 168 U. S. 311 and cases cited. Also Holloway *vs.* Dunham 170 U. S. 615; and Young *vs.* Amy 171 U. S. 179.

It is true, this court has held that alleged errors in the admission or rejection of the evidence, if duly excepted to, might be reviewed in such cases.

But, it is also held this can not be done in a case where to do so involves an examination of the weight of the evidence and disregarding the facts so found. Young *vs.* Amy, *supra;* Marshall *vs.* Brutis, No. 118, decided by this court, January 30, 1899.

In the case at bar the court made the following findings of fact:

> "1. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece or parcel

of land described in the complaint as Lot numbered four (4), in Block numbered four (4), in the town of Juneau, District of Alaska according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin Streets in said town of Juneau, claiming said lot, piece or parcel of land in their own right; and the said plaintiff and his grantors have, ever since the date last aforesaid, occupied, used and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same in their own right from that date to the present time adversely to all the world, and especially as against the defendant.

"2. That the plaintiff is the owner of an undivided half (½) part or interest of, in, and to said Lot No. 4, in said Block No. 4, hereinbefore described, and that the whole of said lot, piece or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

"3. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece or parcel of land in the complaint described and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff."

And as conclusions of law from these facts, the court found and decided as follows:

"1. That the plaintiff is the owner and entitled to the possession of an undivided one-half part or interest of, in, and to said lot, piece, or parcel of land as the same is described in the complaint on file herein as against the defendant and all persons claiming or to claim the same or any part of said right or interest of the plaintiff in and to said lot, piece, or parcel of land under him, the said defendant, and that the defendant has no right, title or interest in or to said land or any part thereof.

"2. That the plaintiff is entitled to a judgment as prayed for in his complaint, for the recovery of the possession of an undivided one-half part or interest of, in, and to said Lot No. 4, in said Block No. 4, in said town of Juneau, against said defendant and all persons claiming or to claim the said or any part thereof under or through the said defendant.

"3. That the plaintiff is entitled to a judgment for costs, to be taxed herein against the defendant."

That the facts found by the court are sufficient to support the decision and judgment of the court, will hardly be questioned.

Can this court undertake to examine and review the objections to the evidence introduced by the plaintiff, without examining the weight of the evidence and disregarding the facts as found? We think not. This being the case, the only remaining question for review is, that of the sufficiency of the evidence to support the conclusions of law and judgment rendered.

In the case of Young *vs.* Amy, *supra*, this Court, referring to the question of its right to review the

objections made to the admission or rejection of evidence said:

> "But the express finding from all the evidence by the Supreme Court of the State is that the summons in the divorce suit was duly issued and published according to law, and that the defendant had, besides, personal notice of the pendancy of the suit. This conclusion being binding upon us, establishes that the evidence was relevant and material, and there was no ground to reject it. We can not, therefore, say that the evidence should have been disregarded, because it did not establish the facts which we are bound to conclude it did fully prove. If specific findings of each item of evidence and the conclusions deduced from the separate items had been made as in Cheely *vs.* Clayton, 110 U. S. 702, the case would present a different aspect, considering, however, the state of the record and the nature of the findings of fact certified, we can not determine the correctness of the objections to the evidence without going into its weight and making independent conclusions of fact; in other words, without disregarding the findings made by the court below, by which we are concluded."

So, in the case at bar, the objections were to the record of the original location of the ground in controversy, and to the record of the various deeds showing a connected chain of title from such locator to the plaintiff.

The principal objection was that the records of the recorder's office for the District, or certified copies of records were introduced, without accounting for the absence of the original.

Near the bottom of page 20 of the Record, the court referring to the defendant's objections said:

> "By the court: There is one point suggested by Mr. Trumbell, and that is you have not laid the foundation for this evidence. *The ground on which I hold these instruments admissable is they are evidence tending to show occupation and possession.*"

The original deed to the plaintiff, and oral evidence showing occupation and possession by plaintiff and his grantors since April 19, 1891, was also introduced. This court cannot, therefore, consider these objections to *a part only* of the evidence introduced, under the finding of facts as set out by the court, without "going into its weight and making independent conclusions of fact." This, we have seen, the court will not do. Hence we will not further discuss these objections.

The Act of 1884.

By the act of Congress of May 17, 1884 (23 Stat. at L. 24) it was provided that:

> "The Indians or other persons in said District (Alaska) shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

At the date of the passage of this act, the grantor of the plaintiff had been in actual possession and occupation of the premises in controversy, claiming it by right of prior occupancy, to the exclusion of

all the world, for a period of more than a year. (See location notice, Rec. p. 29).

His right to the possession and occupancy of the tract was confirmed, and his protection therein guaranteed by this act. The only condition annexed to his claim was, that Congress reserved the right to prescribe the *terms* under which he might acquire title to the land, which *terms*, it was promised, should be provided in future legislation by Congress.

It follows therefore, that upon the finding by the lower court, that the plaintiff and his grantors, on the 19th day of April, 1881, entered into actual possession of the land in controversy, claiming said parcel of land, in their own right, and that they have ever since said date occupied, used and possessed said tract, having erected a substantial frame or wooden building thereon using and claiming the same in their own right from that date to the present time adversely to all the world, and especially as against the plaintiff, he is clearly entitled to a judgment for the possession of the premises, under the confirmation and guarantee given by Congress in the Act of 1884, *supra*, supplemented by the promised terms, which were provided by the Act of March 3, 1891, under which he asserts title.

Appellant's Claim.

Appellant claims the property under a marshal's deed and upon a judgment against VanGasken and Birmingham, but the Record shows they never owned the property as a firm, and that VanGasken, who once claimed it, had conveyed it to the Alaska Commercial and Packing Company, by deed, nearly

three years before the suit upon which judgment was rendered and the sale made was commenced, and before it is even claimed any lien attached to the property. It follows that the sale of the property of the Alaska Commercial and Paking Company a duly incorporated company, upon a judgment against VanGasken and Birmingham, is a nullity. And, besides, there is in the record, the written notice given by the attorney of the company, to the Marshal after he received the writ and before he made the sale, that the land was the property of the company and not of VanGasken and Birmingham. It was also admitted by the appellant that he heard the said attorney for the company give a similar notice at the time of the sale. Appellant and his grantors were therefore, purchasers with full knowledge that the land was not the property of the judgment and execution defendants, but of the grantors of the appellee.

It follows that under no circumstances has he any right to the possession of the land in controversy, and the possession taken by him was tortuous and wrongful from the beginning.

Again, an examination of the Record, at page 50, shows that these judgment defendants were served by *publication only*. It will be seen also, by an inspection of the same page of the record, that a personal judgment was rendered upon this substituted service. And, although an attachment was issued, the marshal's return and recitals in the deed executed by him show the sale was made upon a levy under the execution, after a return of no personal property found, and the attachment was abandoned.

Now, the court had no power to render a judgment *in personam*, upon this notice by publication only. Such a judgment could be rendered only where personal service upon the defendants is affirmatively shown by the Record, or waived by them. Penoyer *vs.* Neff 95 U. S. 704; Cooper *vs.* Reynolds 77 U. S. 308; Owens *vs.* McCloskey 161 U. S. 642; Davis *vs.* Wakler 156 U. S. 680.

It follows that this personal judgment rendered upon notice by publication is void and no sale made upon it could give any title whatever. Hence, Malony's claim based upon the sale would be void, even if the judgment defendants had been the owner's of the lot at the date of the levy.

The attempt to tack on to this unfounded claim, the additional one, that the property was abandoned by the grantors of the appellee, and hence open to appropriation by the appellant, finds no support in the evidence in the Record, and is conclusively settled against him by the findings of fact by the lower court, which we have seen are conclusive upon this court.

Upon the whole case we insist the judgment of the United States District Court for the District of Alaska is correct and should be in all things affirmed.

S. M Stockslager,
George C. Heard,
Attorneys for Appellee.

No. 67.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

JOHN F. MALONEY,
Appellant,
vs.
O. H. ADSIT,
Appellee.

No. 67. October Term, 1899.

Authorities cited or referred to by counsel for appellee in oral argument, which are not on the brief:

Bearing upon the sufficiency of complaint, involving possessory title only:

Lamb *vs.* Davenport, 1 Sawyer, 609. Affirmed by the Supreme Court of the United States, 80 U. S., 418.
People *vs.* Shearer, 30 California, 645.
Richardson *vs.* McNulty, 24 California, 339.
Moon *vs.* Rollins, 36 California, 339.
Mickey *vs.* Stratton, 5 Sawyer, 475.

Decisions involving Alaska lands:

Campbell *vs.* Silver Bow, &c., Mining Co., 49 Fed. Rep., 47.
Miller *vs.* Blackett, 47 Fed. Rep., 547.
Carroll *vs.* Price, 81 Fed. Rep. 137.

Bearing upon Bill of Exceptions:

Section 233, Hill's Annotated Statutes, Oregon: "The statement of the exceptions, when settled and allowed,

shall be signed by the judge and filed with the clerk, and thereafter it shall be decreed and taken to be a part of the record of the cause." * * *

In the English and American Encyclopædia of Law, vol. 12, p. 13, the general rule is thus stated:

"In the absence of statutory provision, the approval of the judge who presided at the trial is indispensable to the statement of facts in order that they shall receive attention on appeal." (See cases cited in support of text.)

There does not seem to be any statutory provision in Oregon authorizing the signing of a Bill of Exceptions by any one except the trial judge.

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